

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Telecommunications Relay Services and	)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals with	)	
Hearing and Speech Disabilities	)	
	)	
Structure and Practice of the Video Relay Service	)	CG Docket No. 10-51
Program	)	
	)	
Interstate Telecommunications Relay Services Fund	)	
Payment Formula and Fund Size Estimate for the	)	
July 2017 Through June 2018 Fund Year	)	

To: Secretary, FCC  
For: Chief, Consumer and Governmental Affairs Bureau

**COMMENTS OF HAMILTON RELAY, INC.**

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## **Table of Contents**

	<b>Summary</b> .....	i
<b>I.</b>	<b>Hamilton Supports the Proposed MARS Rates for Traditional TRS, STS, CTS, and IP CTS</b> .....	3
	A. The Administrator Appears to Have Correctly Calculated the MARS Rates.....	3
	B. Freezing or Otherwise Deviating from the MARS Methodology Would Require a Commission-Level Decision .....	4
<b>II.</b>	<b>MARS Continues to be the Most Appropriate Method for Calculating the IP CTS Rate</b> .....	5
<b>III.</b>	<b>Switching IP CTS Rate Methodologies Would Be Premature At This Time</b> .....	9
	A. The Commission Should Address Other Unresolved Issues in the IP CTS <i>FNPRM</i> Before Engaging in Harmful Rate Cuts.....	9
	B. The Commission Should Allow Private Industry to Innovate to Improve Relay Services.....	12
	C. The Tepid Support in the Record for an Alternative IP CTS Rate Methodology Is Now Stale and Would Require the Commission to Refresh the Record .....	12
	D. The New Office of Economics and Data Should Be Tasked with Analyzing Relay Rates Holistically.....	13
<b>IV.</b>	<b>The Commission May Not Adopt an IP CTS Rate Based on Cost Data Collected by the Administrator</b> .....	13
<b>V.</b>	<b>Conclusion</b> .....	16

## SUMMARY

Hamilton Relay, Inc. (“Hamilton”) appreciates the opportunity to file these comments in response to the proposed compensation rates for various relay services, as submitted by the TRS Fund Administrator (“Administrator”) on May 2, 2017. As discussed below, Hamilton supports the continued use of the Multistate Average Rate Structure (“MARS”) methodology for traditional TRS, Speech-to-Speech, Captioned Telephone Service (“CTS”), and Internet Protocol Captioned Telephone Service (“IP CTS”) for the July 1, 2017-June 30, 2018 funding year.

Hamilton opposes the Administrator’s proposed alternative IP CTS reimbursement calculations, on both procedural and substantive grounds, and opposes any rate freeze for IP CTS. Among other reasons, the Bureau lacks the authority to deviate from the adoption of the Administrator’s calculated MARS rate for IP CTS. Hamilton supports the continued use of MARS for IP CTS because it is the only market-based rate methodology and has produced rates that are consistent with increases in the Consumer Price Index and the Employment Cost Index over the past 10 years. The tepid support in the record for an alternative IP CTS rate is now stale, and would require the Commission to refresh the record in any event to examine the eight alternative methodologies proposed by the Administrator. Hamilton believes that, as part of any effort to refresh the record, the Commission should task the new Office of Economics and Data with analyzing relay rates holistically prior to any deviation from the use of MARS.

Rather than focusing on harmful rate cuts, the Commission should allow private industry, not government-funded research, to drive innovation in ways that will serve to improve relay services. The Commission should also prioritize other unresolved issues from the 2013 *Further Notice of Proposed Rulemaking*, including service quality, registration, verification, and marketing issues, as well as the recommendations of the Government Accountability Office and the Commission’s Disability Advisory Committee.

Finally, the Commission may not rely on the IP CTS cost data provided by the Administrator, because the Commission has never sought comment on the appropriate categories of allowable costs for IP CTS, and because the data forms being used by the Administrator have not been approved by the Office of Management and Budget (“OMB”) and do not bear an OMB Control Number as required for any information collection. These deficiencies must be resolved before the Commission may appropriately rely on cost data submissions by IP CTS providers.

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Hamilton Relay, Inc. (“Hamilton”), by its counsel, submits these comments in response to the *Public Notice* (“*Notice*”) issued by the Commission’s Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceedings.<sup>1</sup> In the *Notice*, the Bureau seeks comment on the compensation rates for various forms of interstate Telecommunications Relay Services (“TRS”) for the period beginning July 1, 2017 through June 30, 2018. The proposed TRS compensation rates were submitted by the interstate TRS Fund Administrator (“Administrator”) in its May 2, 2017 filing (“*2017 TRS Rate Filing*”).<sup>2</sup>

As discussed below, Hamilton supports the Administrator’s proposed rates for traditional TRS and Speech-to-Speech (“STS”) services, including the proposed additional per-minute

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<sup>1</sup> *Rolka Loube Associates Submits Payment Formulas and Funding Requirement for the Interstate Telecommunications Relay Services Fund for the 2017-18 Fund Year*, Public Notice, CG Docket Nos. 03-123, 10-51, DA 17-445 (rel. May 10, 2017) (“*Notice*”).

<sup>2</sup> *See Rolka Loube Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, CG Docket Nos. 03-123, 10-51 (filed May 2, 2017) (“*2017 TRS Rate Filing*”).

amount for STS outreach. In addition, Hamilton supports the proposed rates for interstate Captioned Telephone Service (“CTS”) and Internet Protocol Captioned Telephone Service (“IP CTS”).<sup>3</sup> Hamilton also supports the Administrator’s proposal to incorporate demand for the final two months of the 2016-2017 funding year, which will be paid for during the 2017-2018 funding year, and the proposal for the payment reserve to remain at two average months.<sup>4</sup>

Hamilton opposes the Administrator’s proposed alternative IP CTS reimbursement calculations, on both procedural and substantive grounds. As a procedural matter, the Administrator’s proposed alternative rate approaches are novel approaches that cannot be adopted by the Bureau, as the Bureau appears to recognize in the *Notice*.<sup>5</sup> The only appropriate rate for the Bureau to adopt at this time is the IP CTS rate calculated for the 2017-2018 fund year using the Multi-state Average Rate Structure (“MARS”) methodology. Deviating from the properly calculated MARS rate pending the resolution of a now four-year-old *Further Notice of Proposed Rulemaking* (“FNPRM”)<sup>6</sup> would be procedurally improper and unjustified in the record. Any decision to refresh the record on rates must be made at the Commission level.

As a substantive matter, rather than focusing on harmful rate reductions, the Commission should focus on improving its service quality measurements, as recommended by the Government Accountability Office (“GAO”), enforcing and improving its IP CTS eligibility

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<sup>3</sup> Hamilton does not offer Video Relay Services (“VRS”) or IP Relay service, and therefore is not commenting on the proposed rates for those services.

<sup>4</sup> *2017 TRS Rate Filing*, at 51.

<sup>5</sup> *Notice*, at 2 (“[I]t is premature to select one of the specific [Administrator] recommendations.... [A]s appropriate, we may seek comment on certain of these recommendations as part of [a] pending rulemaking.”).

<sup>6</sup> *Misuse of Internet Protocol (IP) Captioned Telephone Service et al.*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 13420, ¶¶ 111-27 (“*2013 IP CTS Report and Order and FNPRM*”).

regulations, ensuring that essential relay services are made available to consumers who need it most, and encouraging provider-led innovations in relay services.

**I. Hamilton Supports the Proposed MARS Rates for Traditional TRS, STS, CTS, and IP CTS**

Since 2007, the Commission has used a weighted average of state TRS rates to calculate the MARS compensation rates for interstate traditional TRS and STS, and a weighted average of state CTS rates to calculate the MARS compensation rates for interstate CTS and IP CTS.<sup>7</sup> As the GAO noted in its independent report on TRS: “MARS uses an average of competitively bid state rates for intrastate TRS to determine predictable, fair, and reasonable costs of interstate TRS.”<sup>8</sup> Hamilton agrees, and supports the continued use of MARS for these services, including IP CTS.

**A. The Administrator Appears to Have Correctly Calculated the MARS Rates**

Hamilton supports the adoption of the Administrator’s proposed MARS-based rate of \$2.9186 per conversation minute for interstate traditional TRS and \$4.0496 for interstate STS.<sup>9</sup> Similarly, Hamilton supports the Administrator’s proposed rate of \$1.9467 per conversation minute for interstate CTS and IP CTS.<sup>10</sup> Based on the information available to Hamilton, it appears that the Administrator correctly calculated the rates for these services using the Commission-approved MARS methodology.

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<sup>7</sup> See *Telecommunications Relay Services and Speech-to-Speech for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140 (2007) (“2007 Order”).

<sup>8</sup> GAO Report to the Honorable Jeff Sessions, U.S. Senate, on Telecommunications Relay Service, at 8 (Apr. 2015), <http://www.gao.gov/products/GAO-15-409> (“GAO Report”).

<sup>9</sup> Notice at 1.

<sup>10</sup> *Id.* at 1.

B. Freezing or Otherwise Deviating from the MARS Methodology Would Require a Commission-Level Decision

The *Notice* seeks comment on whether an extension of the current IP CTS compensation rate would be sufficient to compensate IP CTS providers for the reasonable costs of providing IP CTS pending the effectiveness of a new rate.<sup>11</sup> Hamilton opposes a rate freeze because the Bureau has not provided any economic justification in the *Notice* for imposing a freeze.<sup>12</sup> The burden of proving that a rate freeze is justified is properly placed on the Commission, not providers. Absent such proof in the record, a rate freeze is wholly unjustified, particularly since, as shown below, the MARS rate (and thus the underlying costs of providing the service) has increased each year consistent with rising consumer prices, and at a lower rate than labor cost increases.

The fact that a now-stale *FNPRM* from 2013 sought comment on alternative rate methodologies cannot be used by the Bureau four years later as a justification for a rate freeze. There is nothing new in the record to justify a rate freeze. The imposition of a rate freeze will have negative consequences for IP CTS providers, whose costs increase annually due to rising labor costs. Just as importantly, a rate freeze would harm consumers by incentivizing quality of service reductions, and compromise the providers' ability to innovate.

Moreover, the Bureau lacks the authority to impose a rate freeze. The Bureau may not unilaterally override the Commission's determination in 2007 to use MARS for IP CTS, particularly if the only justification offered by the Bureau is that the Commission may, at some

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<sup>11</sup> *Id.* at 2.

<sup>12</sup> The Administrator suggests that there is an "apparent lack of correlation between the MARS CTS rate and the reported costs for IP CTS." *2017 TRS Rate Filing*, at 19. Given the uncertainty expressed in the Administrator's statement, and the lack of any supporting data, the Administrator's suggestion is facially incapable of justifying a rate freeze or the adoption of another rate methodology for IP CTS.



indeterminate point in the future, choose a different, as-yet unknown rate methodology. The Commission specifically decided in the *2007 Order* that IP CTS should be compensated according to MARS. The Bureau is duty-bound to apply the decisions of the full Commission.<sup>13</sup> Accordingly, the Bureau should not bypass Commissioners by freezing or changing the MARS methodology absent further guidance from a majority of Commissioners.<sup>14</sup>

## **II. MARS Continues to be the Most Appropriate Method for Calculating the IP CTS Rate**

As Hamilton has explained previously, the Commission should continue to rely on MARS for IP CTS.<sup>15</sup> MARS is far superior to a cost-based mechanism because it relies on

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<sup>13</sup> *WLDI, Inc.*, 17 FCC Rcd 14750, ¶ 9 (EB 2002) (“[T]he Bureau has no authority to alter or depart from Commission precedent.”); 47 C.F.R. § 0.361 (Bureau Chief must refer matters to the full Commission if they “cannot be resolved under existing precedents and guidelines”). Although the Bureau imposed a rate freeze for VRS in 2006, 21 FCC Rcd 7018 (CGB 2006), that decision was issued prior to the Commission’s decision to mandate MARS for IP CTS and other services. Moreover, that decision did not examine the Bureau’s authority to impose the freeze. Notably, the 2007 MARS decision did not delegate any authority to the Bureau to deviate from the use of MARS. More recently, the Bureau declined to address the merits of a proposal filed by VRS providers requesting a rate freeze, ruling instead that “[a]ction on that proposal will be addressed separately from this order.” *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 30 FCC Rcd 7063, ¶ 3 (CGB 2015). The full Commission subsequently adopted that rate freeze. *See Structure and Practices of the Video Relay Services Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, 30 FCC Rcd 12973 (2015); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 31 FCC Rcd 7246, ¶ 21 (CGB 2016) (“These VRS compensation rates were adopted by the Commission...and consequently are not subject to modification in this Order.”).

<sup>14</sup> *See* Commissioner O’Rielly blog, “A Modified Delegated Authority Proposal” (Feb. 22, 2017) (“Fixing the overuse of delegated authority should be high on our list of priorities as the new Commission examines internal process reform.”).

<sup>15</sup> *See, e.g.,* Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123, 13-24, at 1-10 (filed Nov. 4, 2013) (“Hamilton Comments Nov. 2013”); Reply Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123, 13-24, at 1-9 (filed Dec. 4, 2013) (“Hamilton Reply Comments Dec. 2013”); Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123, 10-51, at 6-10 (filed May 23, 2014); Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123, 10-51, at 4-9 (filed June (continued))...

competition, whereas all other pricing models used by the Commission for relay services attempt to replicate a competitive rate. As Chairman Pai recently noted, “regulators will always struggle to set the ‘right’ price.”<sup>16</sup> There is no need for such a struggle when a rate is established by competition.

As the Commission and the courts have recognized, competition acts to constrain prices.<sup>17</sup> And competition among CTS providers at the state level has indeed resulted in a MARS rate that has tracked the Consumer Price Index (“CPI”) and Employment Cost Index (“ECI”) over the past decade. Annual changes in the rate are summarized by the following chart:

**Table 1: MARS Rate Increase vs CPI and ECI**

Date	CTS/IP CTS MARS			CPI		ECI	
	Annual Rate	Rate Increase	% Change	Indexed Value	% Change	Indexed Value	% Change
[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]
July 1st, 2008	\$1.6569			212.6		107.9	
July 1st, 2009	\$1.6778	\$0.0209	1.26%	214.3	0.78%	110.0	1.90%
July 1st, 2010	\$1.6951	\$0.0173	1.03%	217.0	1.26%	111.7	1.52%
July 1st, 2011	\$1.7630	\$0.0679	4.01%	221.7	2.17%	113.5	1.66%
July 1st, 2012	\$1.7730	\$0.0100	0.57%	227.8	2.76%	115.5	1.78%
July 1st, 2013	\$1.7877	\$0.0147	0.83%	231.7	1.72%	117.6	1.82%
July 1st, 2014	\$1.8205	\$0.0328	1.83%	235.4	1.56%	120.0	1.98%
July 1st, 2015	\$1.8895	\$0.0690	3.79%	236.7	0.57%	122.7	2.27%
July 1st, 2016	\$1.9058	\$0.0163	0.86%	238.4	0.73%	125.5	2.30%
July 1st, 2017 (Proposed)	\$1.9467	\$0.0409	2.15%	242.0	1.49%	127.0	1.22%
<b>Average</b>			<b>1.81%</b>	<b>1.44%</b>		<b>1.90%</b>	

4, 2015); Reply Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123, 13-24, at 2-3 (filed May 26, 2016).

<sup>16</sup> *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Technology Transitions*, GN Docket No. 13-5; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Report and Order, FCC 17-39 (adopted Apr. 20, 2017) (separate statement of Chairman Pai, at 1) (“Pai Statement”).

<sup>17</sup> See, e.g., *Illinois Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 558-60 (D.C. Cir. 1997) (per curiam), citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 20541, ¶¶ 49, 51 (1996).

Sources:

Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, Before the Federal Communications Commission, pg. 113, Exhibit 1-3.

U.S. Government Accountability Office "Telecommunications Relay Service, FCC Should Strengthen Its Management of Program to Assist Persons with Hearing or Speech Disabilities", pg. 54.

U.S. Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers: All Items [CPIAUCSL], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/CPIAUCSL>, May 23, 2017.

U.S. Bureau of Labor Statistics, Employment Cost Index: Wages and Salaries: Private Industry Workers [ECIWAG], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/ECIWAG>, May 23, 2017.

Notes:

- [2]: The CTS/IP CTS MARS Rate starting at date in [1]. Rate is constant from July 1 until June 30 the following year.
- [3]: CTS/IP CTS MARS rate change, expressed in cents.
- [4]: CTS/IP CTS MARS Percentage Rate change. The average calculated is the geometric mean.
- [5]: The Consumer Price Index for All Urban Consumers: All Items (1982-84 = 100). An indexed measure of the price of goods. The value is taken as an average of the 12 months prior to the date in [1]. The value for 2017 is taken from 12 months prior to April 1, 2017.
- [6]: The rate increase in the CPI. The average calculated is the geometric mean over nine years.
- [7]: The Employment Cost Index: Wages and Salaries: Private Industry Workers (December 2005 = 100). An indexed measure of wages and salaries for all private industry workers. The value is taken as an average of the 12 months prior to the date in [1]. The value for 2017 is taken from the 12 months prior January 1, 2017.
- [8]: The rate increase in the ECI. The average calculated is the geometric mean over nine years.

Thus, both the average annual increase for the CTS/IP CTS MARS rate since its inception, and the average annual increase of the CPI over the same period, have been less than

2%. In fact, the approximately 2% increase in the CTS/IP CTS rate from 2016 to 2017 is actually lower than the average monthly CPI increases to date in 2017.<sup>18</sup>

Because labor costs associated with CAs are the principal driver of cost increases for IP CTS providers, it is more accurate to compare MARS to the ECI than to CPI. Over the past 10 years, the ECI has realized an average annual growth rate of **1.90%**.<sup>19</sup> In contrast, the CTS/IP CTS MARS rate increase over the same period has been lower, at **1.81%**. The Commission cannot ignore these figures – they must be addressed in the record prior to any decision to deviate from MARS. When viewed in comparison to rising prices generally, the MARS rate is well within the realm of reasonableness.

The Administrator has repeatedly recognized that such minor annual increases are “modest,” including in its filing this year.<sup>20</sup> MARS has been successful as a rate methodology in part because of the regulatory certainty it has provided over time. These modest, stable increases are almost entirely the result of unavoidable increases in labor costs. The labor costs associated with specialized communications assistant (“CA”) employees have been (and remain) the principal driver of costs in the TRS industry. Despite these rising labor costs, the MARS IP CTS rate has remained remarkably steady and predictable, particularly when viewed in comparison to labor statistic benchmarks.

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<sup>18</sup> See Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers: U.S. City Average, All Items 2008-2017 (April) average (latest annual figures available), available at [http://data.bls.gov/pdq/SurveyOutputServlet?request\\_action=wh&graph\\_name=CU\\_cpibrief](http://data.bls.gov/pdq/SurveyOutputServlet?request_action=wh&graph_name=CU_cpibrief) (last visited May 19, 2017). Monthly CPI increases from January-April 2017 have been 2.5%, 2.7%, 2.4%, and 2.2%, respectively.

<sup>19</sup> See Column [8] of Table 1.

<sup>20</sup> *2017 TRS Rate Filing*, at 18; *2016 TRS Rate Filing*, at 19; *2015 TRS Rate Filing*, at 17; *2014 TRS Rate Filing*, at 13. Such a finding is consistent with the GAO’s conclusion that the “reimbursements rates for other forms of TRS, such as CTS, IP CTS, TTY, and STS, have increased moderately since 2011.” GAO Report, at 15.

Because MARS relies on CTS providers' competitive bids at the state level, and because the costs for providing CTS accurately reflect the reasonable actual costs of providing IP CTS, MARS best reflects the market price for captioned relay services – the lowest price consistent with recouping providers' reasonable costs.<sup>21</sup>

### **III. Switching IP CTS Rate Methodologies Would Be Premature At This Time**

Prior to making any determination as to whether a change to the IP CTS rate methodology is required, the FCC should take a number of other steps to improve IP CTS. As detailed below, the FCC should: (i) address outstanding issues raised in the 2013 *FNPRM* related to performance measures and service quality standards; (ii) focus on fostering innovations which may improve relay services overall; (iii) refresh the record on rates and seek comment on the Administrator's IP CTS rate proposals; and (iv) task the new Office of Economics and Data (“OED”) with analyzing the current IP CTS rate methodology and proposed alternatives.

#### **A. The Commission Should Address Other Unresolved Issues in the IP CTS *FNPRM* Before Engaging in Harmful Rate Cuts**

Rate methodology is an important, but not all-encompassing aspect of ensuring high quality IP CTS, as exemplified by the numerous service quality, registration, verification, and marketing issues raised in the *FNPRM*. The Commission has several mechanisms for relieving pressure on the TRS Fund size besides arbitrarily freezing or lowering the reimbursement rate.

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<sup>21</sup> The record to date shows that the costs of providing CTS and IP CTS are virtually the same, given that providers use the same Communications Assistants (“CAs”) for both CTS and IP CTS. Because labor is the most significant cost of providing CTS and IP CTS, and because both services use essentially the same infrastructure, the service costs are virtually the same. To the extent that the Commission disagrees with its previous finding that the cost recovery rate for CTS accurately reflects the reasonable actual costs of providing IP CTS, it should initiate a rulemaking proceeding to permit comment on these issues prior to altering the IP CTS rate methodology without a supporting record.

These mechanisms were raised by the Commission in the *FNPRM* and should be resolved prior to any rate methodology decisions.

Consistent with Consumer Group suggestions, the Commission should focus on adopting GAO-recommended compliance standards for IP CTS. In its report, the GAO found that the Commission has not sufficiently developed performance and compliance measures for the TRS program.<sup>22</sup> Hamilton agrees. The record supports, as part of this effort, adopting workable IP CTS compliance standards in coordination with all stakeholders.<sup>23</sup> For example, in September 2016, the FCC’s Disability Advisory Committee recommended that the FCC “establish rules and standards for IP CTS quality of service through a proposed rulemaking proceeding ... [and] propose amendments to its current rules as needed to specifically address IP CTS quality of service.”<sup>24</sup> Consumer Groups and IP CTS providers have also urged the Commission to adopt quality and service standards.<sup>25</sup> Hamilton has been a long-time proponent of standards for speed,

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<sup>22</sup> GAO Report, at 17-20.

<sup>23</sup> See Reply Comments of Ultratec Inc., CG Docket Nos. 10-51, 03-123, at 4 (filed June 11, 2015); Comments of Consumer Groups and Registry of Interpreters for the Deaf, CG Docket Nos. 10-51, 03-123, at 2 (filed June 4, 2015) (urging the Commission to “address and implement the [GAO] Report recommendations fully”) (“Consumer Groups June 2015 Comments”); Comment of Hamilton Reply, Inc., CG Docket Nos. 10-51, 03-123, at 12-13 (filed June 4, 2015) (encouraging the FCC to adopt “clearly defined, measurable standards for IP CTS”).

<sup>24</sup> Recommendation of the Federal Communications Commission Disability Advisory Committee; IP CTS Quality of Service at 1 (Sept. 26, 2016), <https://ecfsapi.fcc.gov/file/109232373106842/Adopted%20DAC%20IP%20CTS%20Quality%20Recommendations%20%209-22-16.pdf>.

<sup>25</sup> See, e.g., Comments of the Hearing Loss Association of America et al., CG Docket Nos. 13-24, 03-123, at 20 (filed Nov. 4, 2013); Reply Comments of Sprint Corporation, CG Docket Nos. 13-24, 03-123, at 7-8 (filed Dec. 4, 2013) (urging the FCC to work with industry to develop objective, measurable and enforceable quality of service metrics); Comments of Miracom USA, Inc., CG Docket Nos. 13-24, 03-123, at 3 (filed Oct. 23, 2013) (encouraging the FCC to adopt minimum standards related to speed of captioning and error rate) (“Miracom Oct. 2013 Comments”); see also Comments of Ultratec, Inc., CG Docket Nos. 10-51, 03-123, at 6 (filed June 3, 2014), (saying that Ultratec does not object to mandatory minimum IP CTS standards, provided they are adopted in conjunction with industry stakeholders and applied uniformly); (continued)...

accuracy and verbatim/summarization,<sup>26</sup> and again urges the Commission to take action on these issues.<sup>27</sup>

Adopting quality and service standards for IP CTS should take place before any changes to the rate methodology. Consumer groups have already noted their preference for the adoption of performance goals over further rate reductions:

As stated in the GAO Report, the FCC needs to establish performance goals and internal controls to oversee its national TRS Program. Unless and until the FCC acts on this responsibility, further rate cuts threaten to erode deaf, hard of hearing, deaf-blind, and deaf and mobile-disabled consumers' access to telecommunications services.<sup>28</sup>

The Commission's focus should be on adopting workable performance and compliance goals, including new IP CTS mandatory minimum standards. Hamilton agrees with another commenter that "until the Commission establishes standards for caption accuracy and captioning delay, it would be premature to modify the IP CTS compensation rate"<sup>29</sup> and that the Commission "cannot rationally address the payment rate for IP CTS" without first adopting and implementing standards for accuracy and captioning delay.<sup>30</sup>

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Reply Comments of Ultratec, Inc., CG Docket Nos. 13-24, 03-123, at 8-9 (filed Dec. 4, 2013), (supporting Hamilton's approach to creating standards – namely, working with industry stakeholders).

<sup>26</sup> See Hamilton Comments Nov. 2013, at 14; Hamilton Reply Comments Dec. 2013, at 10-11.

<sup>27</sup> Hamilton notes that the recently adopted VRS item is seeking comment on service quality metrics. *Structure and Practices of the Video Relay Service Program*, Report and Order, Notice of Inquiry, Further Notice of Proposed Rulemaking, and Order, 32 FCC Rcd 2436 ¶¶ 61, 65-77 (2017).

<sup>28</sup> Telecommunications for the Deaf and Hard of Hearing, Inc. et al., Ex Parte Letter, at 1 (filed May 20, 2015).

<sup>29</sup> Comments of Miracom USA, Inc., CG Docket Nos. 13-24, 03-123, at 3 (filed May 23, 2014).

<sup>30</sup> Miracom Oct. 2013 Comments, at 3-4.

B. The Commission Should Allow Private Industry to Innovate to Improve Relay Services

New innovations such as ASR are promising, but require further research, development, and deployment. That research is best carried out by private industry. Industry innovations will evaporate if the MARS rate is frozen or eliminated, particularly if the Commission continues to arbitrarily exclude legitimate research and development costs from allowable costs.

C. The Tepid Support in the Record for an Alternative IP CTS Rate Methodology Is Now Stale and Would Require the Commission to Refresh the Record

The support in the record for MARS is now overwhelming – Hamilton, ClearCaptions, Sprint, and Innocaption all support MARS, and even CaptionCall has expressed partial support for MARS.<sup>31</sup> In contrast, there is tepid support in the record for any alternative rate methodology to MARS for IP CTS, none of it detailed or fresh. Further, the *Notice* implicitly acknowledges that the record is stale.<sup>32</sup>

Additional proceedings are necessary before the Commission may decide to move forward with a new rate methodology, if any, or to freeze the current MARS rate. At the very least, the Commission must engage in traditional administrative notice and comment procedures to allow a robust assessment of any proposed rate methodology, and to consider other alternatives.

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<sup>31</sup> ClearCaptions, LLC, Ex Parte Letter, at 3 (filed May 15, 2017); Sprint Corporation Ex Parte Letter, at 1-2 (filed May 1, 2017); Comments of Sprint Corporation, CG Docket Nos. 03-123, 10-51, at 1-2 (filed June 4, 2015); Miracom Oct. 2013 Comments, at 4. As Hamilton has previously noted, CaptionCall has vacillated in its position on IP CTS rates. *See* Hamilton Relay, Inc. ex parte, CG Docket Nos. 03-123, 13-24, at 2 (filed Mar. 30, 2017).

<sup>32</sup> *Notice*, at 2 (“Because the Commission presently has an open rulemaking to address the appropriate compensation methodology for IP CTS, it is premature to select one of the [Administrator recommendations.]”) (citing *2013 IP CTS Report and Order and FNPRM*, ¶¶ 111-27).



Additionally, the Commission should be obliged to explain why any decision to use a proxy for market-based rates, rather than the market-based rates themselves, is somehow appropriate. To abandon market-based rates in this manner would be unprecedented. Moreover, the Commission should afford providers the opportunity to comment on the proposed costs to be included in any cost-based or rate-of-return methodology, to the extent that such a methodology is proposed.

D. The New Office of Economics and Data Should Be Tasked with Analyzing Relay Rates Holistically

The Commission's OED should be tasked with examining the current IP CTS rate methodology before the Commission engages in a capricious departure from a competition-based rate system to one established by a regulatory agency. A review of MARS and any alternative models would be an appropriate undertaking for this important new office, and would ensure that any departure from MARS is based on sound and legally defensible economic policy. Such a review would also be consistent with Chairman Pai's acknowledgement that "hopes and good intentions can't override economic analysis and hard data."<sup>33</sup>

**IV. The Commission May Not Adopt an IP CTS Rate Based on Cost Data Collected by the Administrator**

For both procedural and substantive reasons, the Commission may not rely on the IP CTS cost data provided by the Administrator. As noted in the *2017 TRS Rate Filing*, the Administrator began collecting this information from providers beginning with the Annual Report for the 2012-2013 program year.<sup>34</sup> However, the Commission did not seek any comment as to the appropriate cost categories or other issues related to the information collection. Rather, the Administrator simply began collecting IP CTS data using the provider data requests

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<sup>33</sup> Pai Statement, at 1.

<sup>34</sup> *2017 TRS Rate Filing*, at 17.

employed for IP Relay and VRS services. As explained below, there are inherent problems with relying on that IP CTS cost data.

Unlike USAC forms and numerous other forms used by the Commission, the Administrator's data request forms for relay providers do not bear an OMB Control Number, and there is no indication in the record that the Administrator's forms have ever been approved as an information collection by the Office of Management and Budget ("OMB").

The Paperwork Reduction Act of 1995 ("PRA") provides that "[a]n agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information ... the Director [of the OMB] has approved the proposed collection of information."<sup>35</sup> The PRA further prohibits agencies from penalizing or denying a benefit to those who have not been informed that a response is not required unless the collection of information displays a valid OMB control number. A party may raise these public protections at any time during an administrative process or judicial action.<sup>36</sup>

The absence of any information collection approval notice on the Administrator's forms raises serious questions about any reliance by the Commission on the data collected in the Administrator's forms, particularly if the Commission intends to freeze or lower the IP CTS. While the IP CTS provider data collected to date has been used for informational purposes only, and has not been used to calculate actual rates for IP CTS, the Administrator's forms must go through a formal OMB approval process before they could be used in connection with any rate methodology.

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<sup>35</sup> 44 U.S.C. § 3507(a).

<sup>36</sup> See 44 U.S.C. § 3512(b); *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 150 (D.C. Cir. 2001) (holding that a PRA claim may be raised even after information has been submitted to the agency); *Saco River Cellular Inc. v. FCC*, 133 F.3d 25, 31 (D.C. Cir. 1998) (PRA "prevents an agency or court from refusing to consider a PRA argument on the ground that it is untimely.").

Importantly, the FCC has never determined what costs are reasonable or allowable in connection with IP CTS, principally because the FCC has used MARS since 2007.<sup>37</sup> Due to this lack of certainty, it is unclear what criteria other IP CTS providers are currently using to report their costs to the Administrator. There are almost certainly wide disparities in the various approaches that IP CTS providers take in submitting their costs. For example, CaptionCall has disclosed that it does not report licensing/technology fees, which may substantially affect any weighted average.<sup>38</sup> In addition, ClearCaptions has noted that unrealistic limitations are placed on generally accepted allocations of General and Administrative expenses.<sup>39</sup> Until the Commission clarifies the allowable cost categories for IP CTS and obtains OMB approval for the Administrator's forms, any reliance on the underlying data would be groundless. As the Commission considers allowable costs for IP CTS, it must be mindful that research and development costs, marketing costs, and equipment costs are all potentially reasonable costs for consideration with IP CTS, even if those costs have been excluded from IP Relay and VRS rate calculations.

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<sup>37</sup> The Commission sought comment in the *FNPRM* on what “allowable costs should be” for IP CTS, and whether the Commission should require the same filings of cost and demand data by IP CTS providers as are currently required of VRS and IP Relay providers. *2013 IP CTS Report and Order and FNPRM*, ¶ 124. However, to date the Commission has not made any determination as to these issues.

<sup>38</sup> CaptionCall, LLC ex parte, CG Docket Nos. 03-123, 13-24, at 3 (Apr. 24, 2017).

<sup>39</sup> ClearCaptions, LLC ex parte, CG Docket Nos. 03-123, 13-24, at 3 (May 15, 2017).

**V. Conclusion**

For the reasons set forth above, the Bureau should adopt the MARS rates as calculated by the Administrator for the entire 2017-2018 fund year.

Respectfully submitted,

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